Office-Supreme Court, U.S.
FILED
JUL 7 1981
ALEXANDER L. STEVAS,
CLERK

81-30

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES LOMAN HUFF,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RANDY TAYLOR
(Counsel of record)
908 Texas Building
810 Main Street
Dallas, Texas 75202
(214) 747-8794

Attorney for the Petitioner

Of Counsel:

J. THOMAS SULLIVAN
University of Puget Sound School of Law
Tacoma, Washington 98402

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

I.

Does an executed waiver of right to jury of twelve in a Federal criminal trial, absent inquiry by the trial judge directed toward the defendant to determine voluntariness and understanding of the waiver and its implications, serve to protect the right of an accused to jury trial by jury?

II.

Does evidence of coercion of an executed waiver of right to jury of twelve by counsel for the accused serve to negate any inference that the waiver was executed knowingly and voluntarily?

III.

May the right to trial by jury of twelve be adequately waived by the oral stipulation offered to the trial court by counsel for a co-defendant being tried jointly with the accused?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF CASES AND AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE:

Case history 3

Facts 3

The Opinion of the Fifth Circuit 6

REASON FOR GRANTING THE WRIT:

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE PETITIONER'S RIGHT TO JURY TRIAL AND STATUTORY RIGHT TO JURY OF TWELVE PERSONS WERE COMPROMISED BY AN INVOLUNTARY OR UNINTELLIGENT WAIVER OF TRIAL BY JURY OF TWELVE PERSONS 7

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: **Page**

Horne v. United States,
264 F.2d 40 (5th Cir. 1959), *cert. denied,*
360 U.S. 934 (1959) 10

Johnson v. Zerbst,
304 U.S. 458 (1938) 13

Patton v. United States,
281 U.S. 276 (1930) 7

Rogers v. United States,
319 F.2d 5 (7th Cir. 1963) 10

United States v. David,
511 F.2d 355 (D.C. Cir. 1975) 9

United States v. Guerro-Peralta,
446 F.2d 876 (9th Cir. 1971) 10, 12

United States v. Lane,
479 F.2d 1134 (6th Cir. 1973) 10

United States v. Richie,
155 U.S.App.D.C. 57, 475 F.2d 1326 (1973) 10

United States v. Spiegel,
604 F.2d 961 (5th Cir. 1979) 8

United States v. Taylor,
498 F.2d 390 (6th Cir. 1974) 10

United States v. Vega,
447 F.2d 698 (2nd Cir. 1971), *cert. denied,*
404 U.S. 1038 (1971) 10

United States v. Reyes,
603 F.2d 69 (9th Cir. 1974) 12

Williams v. Florida,
399 U.S. 78 (1970) 13

Constitutions and Statutes: **Page**

Fifth Amendment to the United States Constitution 2, 13

Sixth Amendment to the United States Constitution 2, 13

Rule 23(a), Federal Rules of Criminal Procedure 9

Rule 23(b), Federal Rules of Criminal Procedure 2, 3, 4, 6, 7, 12

Title 18, United States Code, Section 1341 3

Title 18, United States Code, Section 1503 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

JAMES LOMAN HUFF,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JAMES LOMAN HUFF, the Petitioner herein, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals of the United States for the Fifth Circuit entered in the above-entitled case on February 17, 1981.

OPINIONS BELOW

The opinion of the panel of the Fifth Circuit Court of Appeals, Unit A, has not yet been reported, but a copy of the slip opinion is printed in Appendix A attached hereto, *infra.*

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals (Appendix B, *infra*) was entered on February 17, 1981. Appellant's motion to recall the mandate and for leave to file an out-of-time Petition for Rehearing was granted by the Court on April 9, 1981. Thereafter, Appellants Petition for Rehearing was denied without opinion (Appendix C). On May 19, 1981, the Court entered an order staying issuance of the mandate until July 7, 1981 (Appendix D). The Jurisdiction of the Supreme Court of the United States is invoked under 28 United States Code Section 1254(1).

STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall *** be deprived of life, liberty or property, without due process of law ***"

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ***"

Rule 23(b) of the Federal Rules of Criminal Procedure states:

"(b) Jury of Less Than Twelve. Juries shall be of twelve but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences."

STATEMENT OF THE CASE

Case History

Petitioner JAMES LOMAN HUFF was convicted on two counts of mail fraud charged under Title 18, United States Code, Section 1341, after trial by jury. He was acquitted of a third count, which alleged a violation of Title 18, United States Code, Section 1503. Petitioner was sentenced to serve two four-year sentences, said sentences to run consecutively.

Petitioner thereafter appealed his case to the Fifth Circuit Court of Appeals, which affirmed his conviction on February 17, 1981, without dissent. His Petition for Rehearing was denied without opinion on May 8, 1981 and the mandate was stayed by an order entered May 19, 1981, until July 7, 1981, pending this Petition for Writ of Certiorari.

Facts

The pertinent facts for purposes of this petition relate to the single issue raised in Petitioner's brief on appeal of his conviction to the Fifth Circuit. In his brief on appeal, Petitioner complained that the trial court had committed reversible error in overruling his motion for new trial, based on an alleged violation of Rule 23(b), Federal Rules of

Criminal Procedure. The critical facts for consideration of this issue, with appropriate citations to the record, are as follows:

Petitioner and his co-defendant were tried jointly in the district court. Prior to trial, the trial judge declined the express request of the government to seat an alternate juror. (R. 13). Counsel for the Petitioner then refused to assent to the trial judge's request that counsel agree to proceed with less than twelve jurors in the event of an illness preventing service by a juror. (R. 13).

Once a juror had been disqualified after the jury had been impaneled, the attorney for the government suggested to the court that it would be possible to proceed with eleven jurors. (R. 43). The trial court, however, began to take steps to secure a twelfth juror. Counsel for the co-defenant, MR. CARR, then indicated to the court that the defense would proceed with eleven jurors, following the comment by Petitioner's counsel that he believed the defense "would rather go with the eleven." (R. 44). No further affirmation was offered or elicited from Petitioner's counsel, nor does the record affirmatively demonstrate that counsel discussed a possible Rule 23(b) waiver with Petitioner prior to suggesting his feeling that the defense might proceed with eleven jurors.

The trial proceeded with eleven jurors.

Subsequently, the trial judge inquired as to execution of a written waiver of the twelve person jury requirement of Rule 23(b). At this time, the attorney for the government gave his recollection of the events which led to trial with less than twelve jurors. (R. 511-512). The trial judge then inquired of Petitioner's counsel SIGEL as to whether he would make a statement. (R. 512). MR. SIGEL'S co-counsel for the Petitioner, MR. IRWIN, then requested

the court review the testimony to determine "whether in fact the defendant was asked in open court whether he made such a waiver and exactly by what terms such a waiver was announced to the Court." (R. 513). IRWIN further suggested that the court make inquiry to negate any allegation of coercion or suggestion on the part of counsel in inducing a waiver. (R. 513). IRWIN stated that he personally could not recall the circumstances of the oral waiver. (R. 13).

The attorney for the government then stated that it was the government's understanding that all counsel for both defendants had understood the waiver, as well as the defendants, based on the facts that only eleven jurors were present. (R. 513-514).

SIGEL then stated:

> "Judge, for the record I would have to go along with that. I think that Mr. Irwin is bringing up a point that may come up to *haunt both he and me later.* This may be getting Mr. Huff to do this *under a form of coercion.* I guess because *I know this is what he should do.* At this stage of the proceedings it is just *hard to say this is his free act* at this particular moment. I don't see why he won't sign it." (emphasis supplied).
>
> (R. 514).

At this point, the trial judge queried Petitioner and he stated to the court that he relied on counsel to advise him on matters of law, (R. 514), but denied that his attorneys had ever discussed with him proceeding to trial with only eleven jurors. (R. 514). Petitioner's reply was ambiguous, (R. 515), and the court then instructed the reporter to read back the statements of counsel in waiving the twelfth juror. (R. 516).

After this portion of the trial had been re-read, the trial judge made the following inquiry of Petitioner, directly:

"Q. Mr. Huff, did you hear that your attorney was the one who proposed going ahead with eleven jurors?

A: Yes, your Honor.

Q: Are you willing to rely on his advice?

A: Yes, Your Honor.

Q: Will you sign that?"

At this point, Petitioner signed the waiver form. (R. 516-517).

Subsequently, Petitioner filed a motion for new trial, alleging that the trial judge had erred in accepting the written waiver of the twelve person jury. The affidavit, filed in support of the motion, included Petitioner's statement that he agreed to the waiver only after his attorney, SIGEL, had advised him that the trial judge would impose a harsher sentence for his refusal to cooperate and sign the waiver. Thereafter, SIGEL was permitted to withdraw from Petitioner's case by the trial court. (R. 130). The motion for new trial was overruled.

The opinion of the Fifth Circuit Court of Appeals.

The panel opinion of the Court of Appeals, issued *per curiam,* affirmed the requirement that the literal compliance with Rule 23(b) must be adhered to, and additionally, that there must be an express and intelligent waiver of the jury of twelve by an accused. However, the Court concluded that the expression of assent by counsel, confirmed by the execution of the written instrument and the inquiry undertaken by the trial judge, was sufficient to cure any error in the oral agreement to waive the twelfth

juror initially made in open court. The Court rejected the claim that the questioning of Petitioner by the trial judge was, itself, coercive.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE PETITIONER'S RIGHT TO JURY TRIAL AND STATUTORY RIGHT TO JURY OF TWELVE PERSONS WERE COMPROMISED BY AN INVOLUNTARY OR UNINTELLIGENT WAIVER OF TRIAL BY JURY OF TWELVE PERSONS. (Germane to Questions I, II and III).

At the outset, Petitioner would argue that the critical question for determining the validity of waivers under Rule 23(b), Federal Rules of Criminal Procedure, is not whether the mechanical requirement for written waiver was complied with, but whether the waiver is made expressly, knowingly and intelligently. *Patton v. United States*, 281 U.S. 276 (1930).

The Court below recognized the significance of a knowing and intelligent waiver in affirming Petitioner's conviction, even while noting in its opinion that the record was silent concerning whether or not counsel consulted with Petitioner prior to his tacit agreement to proceed with less than twelve jurors:

> "The record does not disclose whether defense counsel consulted with defendant in making this tactical decision at this stage of the trial."

Thus, as the Court was forced to conclude, the subsequent waiver of the right must be analyzed in light of factors which would demonstrate that the initial decision was either proper or constituted an impropriety rendering the later waiver involuntary.

Petitioner would note that the record demonstrates that the source of the problem in this cause can be traced directly to the action of the district judge in refusing to seat an alternate juror when requested to do so by the attorney for the government. When the district judge requested that counsel agree to proceed with less than twelve jurors in event a problem might arise, defense counsel expressly refused to do so, distinguishing the facts in the instant case from those in *United States v. Spiegel,* 604 F.2d 961 (5th Cir. 1979), where counsel agreed, in advance, to proceed with less than twelve jurors. The Court below relied on *Spiegel* in concluding no violation of the waiver requirement had occurred.

Three problems in the proceedings complicate consideration of the propriety of Petitioner's waiver in this cause and must be evaluated in determining the totality of circumstances surrounding the waiver.

I.

The initial suggestion that trial might proceed with less than twelve jurors was made by the government after the district judge began taking steps to secure a twelfth juror to replace the one excused by the court. In response to the suggestion, counsel for Petitioner, SIGEL, suggested that the defense might be prepared to go along with trial by eleven jurors. The record does not disclose any conversation with Petitioner regarding waiver of the right to twelve person jury at this point.

When counsel for the co-defendant, CARR, advised the court that the defense was ready to proceed with trial with only eleven jurors, the court ordered the proceedings to continue. While the Court in *Speigel* approved the concept that a waiver could be accomplished wholly by the actions of counsel, it would be quite a different matter to permit

counsel for a co-defendant to make such an affirmative waiver of the rights of Petitioner, whom he did not represent. Questioning of the Petitioner was undertaken by the district court at this time to determine that he understood and consented to proceed with eleven jurors. Direct questioning of waiver of fundamental rights of an accused has been deemed appropriate in making a proper determination that the waiver is made knowingly and intelligently. *United States v. David,* 511 F.2d 355 (D.C. Cir. 1975). In *David,* Judge Bazelon discussed waivers under Rule 23(a):

> "While Rule 23(a) insures that there be a documentary manifestation of the defendant's consent (to waive jury trial), that provision of course does not guarantee that the waiver is knowing and intelligent. Many courts – including our own – have indicated that trial judges would be well-advised to directly question the defendant in all cases to determine the validity of any proffered waiver of jury trial. Such questioning is of course particularly crucial where circumstances cast doubt on the validity of a given waiver."
>
> *David,* at 361.

The only waiver made orally at the time the juror was excused and the issue arose was made by counsel for a co-defendant. Not only did the trial judge fail to make inquiry of the defendant or his counsel, directly, but the record fails to affirmatively disclose that the Petitioner was even counseled regarding the waiver at this time. These circumstances cast doubt, in the words of Judge Bazelon, on the validity of the oral waiver made at this point in the proceedings.

II.

Moreover, Petitioner contends that there is an absence of any affirmative waiver of the right to twelve person jury by his attorneys at any point during the proceedings. The Fifth Circuit has held, in *Horne v. United States,* 264 F.2d 40 (5th Cir. 1959), *cert. denied,* 360 U.S. 934 (1959). In *Horne,* the attorney had agreed to begin trial without alternate jurors; stipulated in advance to proceed with fewer than twelve jurors; and agreed to dismissal of an ill joror when the occasion arose. None of these circumstances is evident in instant case and, in fact, counsel had refused to waive Petitioner's right to twelve person jury in advance when requested to do so by the court.

Other courts have been reluctant to conclude that a waiver by counsel for the accused can ever accomplish the waiver, orally, without affirmance by the accused at the time of the waiver. *United States v. Taylor,* 498 F.2d 390 (6th Cir. 1974); *United States v. Gerro-Peralta,* 446 F.2d 876 (9th Cir. 1971); *United States v. Lane,* 479 F.2d 1134 (6th Cir. 1973); *United States v. Richie,* 155 U.S.App.D.C. 57, 475 F.2d 1326 (1973); *Rogers v. United States,* 319 F.2d 5 (7th Cir. 1963). At the least, the waiver made by counsel should be accepted only after the record affirmatively demonstrates consultation between counsel and the accused before the waiver is made. *United States v. Vega,* 447 F.2d 698 (2nd Cir. 1971), *cert. denied,* 404 U.S. 1038 (1971).

The record in this cause fails to show an affirmantive expression of waiver by counsel in any event. The only agreement to proceed with less than twelve jurors made when the juror was excused was made by counsel for the co-defendant and not either of Petitioner's attorneys.

When Petitioner's attorneys were questioned by the court after the court inquired of the need to file a written waiver of the twelve person jury, neither counsel affirmatively stated that they had waived the right. IRWIN suggested that the court review the relevant portion of the statement of facts to determine whether the Petitioner had been asked about his agreement to waive the twelfth juror, pointing out that the court should make its inquiry to negate any inference of coercion in inducing the waiver.

Attorney SIGEL then stated to the court that the situation might come up to "haunt" IRWIN and himself later. He admitted that obtaining the written waiver from Petitioner at that time might be accomplished only through coercion, even though he (SIGEL) knew "this is what he should do." Although SIGEL stated: "I don't see why he won't sign it," he admitted that execution of the waiver might not be the "free act" of the Petitioner.

The facts in this cause do not reflect that counsel made any positive waiver of the Petitioner's right to trial by jury of twelve persons.

III.

The matter of waiver must be viewed in light of the Petitioner's written waiver of jury of twelve, executed after the government had presented its case and most of the defensive evidence had been presented. It was at this point that attorneys IRWIN and SIGEL balked at expressing agreement that the oral stipulation of co-counsel had properly resulted in a trial with less than twelve jurors.

The trial judge conducted an examination of Petitioner at the time the issue of the written waiver arose. Yet, in this examination the Petitioner was never once asked whether he was willing to waive his right to jury of twelve.

Instead, the trial judge merely inquired whether Petitioner relied on his attorney for legal advice and whether Petitioner had heard his attorney propose that the trial go forward with less than twelve jurors. Petitioner responded affirmatively to those two questions and then agreed to execute the written instrument waiving the right, as required by Rule 23(b). This interrogation, coming after the majority of testimony had been presented, occurred at a particularly sensitive moment of the trial, since a refusal by Petitioner to execute the waiver could have required declaration of mistrial.

The record reveals the same type of subtlely coercive situation noted by the court in *United States v. Reyes,* 603 F.2d 69 (9th Cir. 1974), which affirmed the Ninth Circuit's earlier holding in *Guerro-Peralta, supra.* The *Reyes* Court concluded that inquiry by the trial court as to the accused's waiver of right to jury of twelve should be undertaken at the time the accused makes his oral assent to the reduction in jurors. This was not done in the instant case, however, and the trial court's interrogation of Petitioner occurred only after most of the trial had been completed.

The questioning of Petitioner, moreover, reflects no inquiry about his personal understanding that he had a right to be tried before a jury of twelve persons and that was the right he would be waiving.

Finally, an element of coercion which would very definitely have affected the validity of the waiver is demonstrated by Petitioner's affidavit supporting his motion for new trial. In the affidavit, Petitioner alleged that the waiver was made because his attorney, SIGEL, had advised him that the judge might become angry if he refused to execute the waiver and sentence him more harshly as a result of his assertion of his right to jury of twelve.

This coercion is not unsupported, inferentially, by the record. SIGEL had stated to the court that the waiver issue might return to haunt him and IRWIN and suggested that the waiver by the accused would be coercively obtained at this point in the trial. Additionally, SIGEL was permitted to withdraw from Petitioner's case after trial.

It would be improper to assume that the trial judge would punish Petitioner for asserting his constitutional or statutory rights. Thus, counsel's suggestion that that outcome would flow from a failure, or refusal, to execute the waiver would have been unquestionably coercive.

A coerced waiver, particularly of a fundamental right, represents a deprivation of the Fifth Amendment's guarantee of due process of law. *Johnson v. Zerbst,* 304 U.S. 458 (1938). Despite some limitation on the right of jury trial which may occur when such protection is applied to the States, *Williams v. Florida,* 399 U.S. 78 (1970), the right retains fundamental significance as a guarantee of the Sixth Amendment. Waiver of the right must be made knowingly and intelligently and free from coercion, whether the source of the right is the Constitution or federal statute.

The record in the instant case fails to demonstrate that the written waiver of right to jury of twelve was achieved as a knowing, intelligent and freely given waiver by the Petitioner. The record shows, instead, a confused procedure which included affirmation of waiver by counsel for a co-defendant; denial of waiver by Petitioner's own counsel; interrogation of the Petitioner without any inquiry into his personal understanding of the right and willingness to waive it; and suggestion that the waiver was coerced by both the courtroom situation and counsel's improper assertion that Petitioner would be punished in sentencing upon ultimate conviction if Petitioner chose to

exercise his right to jury of twelve when confronted with the need to execute the written waiver.

CONCLUSION

Petitioner prays that this Petition for a Writ of Certiorari be granted or that alternatively, the Judgment of the Court of Appeals and the District Court be vacated and reversed without granting a Writ of Certiorari.

Respectfully submitted,

RANDY TAYLOR
908 Texas Building
810 Main Street
Dallas, Texas 75202
(214) 747-8794
Attorney for the Petitioner

Of Counsel:

J. THOMAS SULLIVAN
Attorney at Law
University of Puget Sound
School of Law
Tacoma, Washington 98402

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

U.S. COURT OF APPEALS
FILED
MAY 19 1981
Gilbert F. Ganucheau
Clerk

No. 80-1199

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES LOMAN HUFF,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

(X) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 7, 1981 , the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be

filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ J. E. Williams

UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Loman HUFF,
Defendant-Appellant.

No. 80-1199
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 17, 1981

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

James Loman Huff appeals his conviction on two counts of mail fraud on the ground that the jury which convicted him consisted of eleven members and that he had not waived a jury of twelve by "expressing intelligent consent," *Patton v. United States,* 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930).

After a jury of twelve had been chosen in Huff's trial, the prosecution made its opening statement to the jury, and the defense requested that it be allowed to make its opening statement at the conclusion of the government's case. The court then undertook to recess for the day. At

this time one of the jurors made known the fact that he was acquainted with the son of defendant Huff. Upon questioning from the judge he indicated he felt that the fact that he knew the son would influence him in the case.

The following colloquy then took place between Mr. Kleinschmidt, the prosecutor, Mr. Sigel and Mr. Carr, counsel for the defendants, and the court:

MR. KLEINSCHMIDT: I wonder if counsel for defense would agree to proceed with eleven, Your Honor, then, because I think it puts—

THE COURT: If we can find the other—next juror we can just excuse him and take the next juror. Who would it be, Jackie?

THE CLERK: Let's see. I believe it would be Eva E. Deaton that wasn't challenged.

THE COURT: Go upstairs and get Miss Deaton.

THE CLERK: Well, let's see. Glenn Deerdoff will be the next juror.

THE COURT: Glenn Deerdoff will be the next juror.

MR. KLEINSCHMIDT: Yes, Your Honor.

THE COURT: We will have to call him.

MR. KLEINSCHMIDT: Your Honor, I think the only problem would be that—

THE COURT: I know that we will have to either go all over it again tomorrow morning is the only thing that I know.

MR. KLEINSCHMIDT: That is what I was wondering if they would agree to eleven.

THE COURT: I will swear the juror in.

. . . . .

MR. SIGEL: Judge, we would—at least, if we could have one minute, I think we would rather go with the eleven.

THE COURT: Well, he would be the next juror who has not been struck.

MR. CARR: They are willing to proceed with just eleven jurors, Your Honor.

THE COURT: You are ready to proceed with eleven jurors?

MR. CARR: I think that is the agreement that has been submitted to the Court. We will proceed with eleven jurors. I think Mr. Kleinschmidt was proposing that to you, Your Honor, and if the Court agrees we will proceed with eleven.

THE COURT: All right. He is gone. All right. We will proceed with eleven jurors.

(Transcript 43—44)

It is to be noted that in this colloquy while prosecutor originally mentioned the possibility of going ahead with eleven jurors, he was interrupted by the judge who went right ahead to obtain a twelfth juror. It was at this point that defense counsel indicated, having found out who the twelfth juror would be, that they would proceed with eleven jurors. The court was ignoring the suggestion of the prosecutor, and it was actually the defense counsel that affirmatively moved ahead to request that the case proceed instead with a jury of eleven.

The record does not disclose whether defense counsel consulted with defendant in making this tactical decision at this stage of the trial.

The case then proceeded with the jury of eleven. After the presentation of evidence, the court asked the pro-

secutor to describe for the record the events leading up to the decision to go forward with eleven jurors. After recounting the events leading to the excusing of a juror, Mr. Kleinschmidt, the prosecutor continued and the following colloquy occurred:

> MR. KLEINSCHMIDT: . . . I believe that the Court suggested that we would have another juror seated and then we would start over, we would swear the jury again, we would read the Indictment again and the Government would make the opening statement and it is my recollection that the defense, rather than have the Government have the opportunity to read the Indictment twice and make an opening statement twice agreed to proceed with just the eleven jurors that we have.
>
> THE COURT: I would like to add that the Clerk had the list, the total list of the jurors and that she had the next juror that had not been struck by either one of the defendants or by the prosecution and that was the one that we were going to bring up here and qualify.
>
> MR. KLEINSCHMIDT: That is correct, Your Honor.
>
> THE COURT: All right. Do you wish to make a statement, Mr. Sigel?
>
> MR. IRWIN (another defense counsel) Your Honor, while I—
>
> MR. SIGEL: One second, We may be able to avoid it.
>
> (Discussion between Mr. Sigel, Mr. Huff and Mr. Irwin.)
>
> MR. IRWIN: I think, Your Honor, it would be appropriate because I am going to state for the record as

a counsel of record that I announced to the Court that we were willing to proceed. The question now arises whether the defendant gave his explicit consent either to counsel or to the Court and I think out of an over abundance of caution and in the interest of justice it might be appropriate that we refer to the record to determine whether in fact the defendant was asked in open court whether he made such a waiver and exactly by what terms such a waiver was announced to the Court. I think it would be appropriate, having made that determination, we would ask the Court to advise the defendant as to what his rights are so that no allegation of coercion on the part of his counsel can be imposed or suggested. I merely make that suggestion to the Court as an officer of the Court because to be quite candid with the Court, I do not specifically recall just what circumstances we advised the Court that we consented to proceed in the absence of a twelfth juror.

MR. KLEINSCHMIDT: I don't have any objection to that, Your Honor. I might be a good idea to check and see what the record shows.

THE COURT: I think I know what the record will show but I will ask the court reporter to check the record.

MR. KLEINSCHMIDT: It is certainly the Government's understanding that all counsel for both defendants and both defendants understood very well that we only had eleven jurors there. In fact, as I recall, when we started the next day you had a problem with one of those jurors because of a warrant and in fact, you know, it was all known throughout the entire trial that there were only eleven people on this jury and that all parties had agreed to it.

MR. SIGEL: Judge, for the record I would have to go along with that. I think that Mr. Irwin is bringing up a point that may come up to haunt both he and me later. This may be getting Mr. Huff to do this under a form of coercion I guess because I know this is what he should do. At this stage of the proceedings it is just hard to say this is his free act at this particular moment. I don't see why he won't sign it.

THE COURT: Mr. Huff, will you stand up, please?

MR. HUFF: Yes ma'am.

THE COURT: Mr. Huff, is Mr. Sigel your attorney?

MR. HUFF: Yes, ma'am.

THE COURT: Is Mr. Irwin your attorney?

MR. HUFF: Yes, ma'am.

THE COURT: Do you rely on them to advise you with regard to the law?

MR. HUFF: Yes, ma'am.

THE COURT: When they tell you that it is all right to go ahead with eleven jurors do you believe them?

MR. HUFF: Yes ma'am.

THE COURT: When they said at the beginning of the trial that it was all right to go ahead with eleven jurors did you rely on them when they said that?

MR. HUFF: I don't recall them saying that to me. We had no discussion about it, Your Honor.

THE COURT: When they said, when either one of them said that it was all right to go ahead with eleven jurors, did you rely on their statement?

MR. HUFF: I am not sure in that particular—

THE COURT: You want to find out just what the record shows?

MR. IRWIN: Your Honor, I think we should out and over abundance of caution.

THE COURT: All right. Will you please look it up, Mr. Court Reporter?

THE REPORTER: "Mr. Sigel: Judge, we would—at least, if we could have one minute, I think we would rather go with the eleven.

"THE COURT: Well, he would be the next juror who has not been struck.

"MR. CARR: They are willing to proceed with just eleven jurors, Your Honor.

"THE COURT: You are ready to proceed with eleven jurors?

"MR. CARR: I think that is the agreement that has been submitted to the Court. We will proceed with eleven jurors. I think Mr. Kleinschmidt was proposing that to you, Your Honor, and if the Court agrees we will proceed with eleven.

"THE COURT: All right. He is gone. All right. We will proceed with eleven jurors.

THE COURT: Mr. Huff, did you hear that your attorney was the one who proposed with going ahead with eleven jurors?

MR. HUFF: Yes, Your Honor.

THE COURT: Are you willing to rely on his advice?

MR. HUFF: Yes, Your Honor.

THE COURT: All right. Will you sign that?

(Mr. Huff signed the instrument.)

THE COURT: All right. There is no place for me to sign it.

MR. KLEINSCHMIDT: Would you like me to read it into the record, Your Honor?

THE COURT: The Clerk will have it in the record.

MR. KLEINSCHMIDT: Very well, Your Honor. Thank you.

THE COURT: And if you wish the Court Reporter will copy it into the record.

MR. KLEINSCHMIDT: Thank you, Your Honor.

THE COURT: Introduce it as an exhibit, Mr. Kleinschmidt and then it will get in the record.

MR. KLEINSCHMIDT: Your Honor, for the purpose of identification I have marked it Government's Exhibit No. 16. It is the Waiver of the Right to a Jury by Twelve. It has been signed by all of the defendants, all of their attorneys and the Government has agreed to it and I signed it on behalf of the Government.

(Transcript 512-517)

Rule 23(b) of the Federal Rules of Criminal Procedure provides:

> b. Jury of Less Than Twelve. Jury shall be of twelve, but at any time before verdict the parties may stipulate in writing with the approval of the Court that the jury shall consist of any number less than twelve or that a valid verdict may be returned by a jury of less than twelve should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

[1] It is recognized that in addition to the literal wording of this rule, there must be a showing of an express and in-

telligent waiver of a jury of twelve by the defendant as the *Patton* case, quoted above, indicates.

[2] We conclude that there has been express, knowing, and intelligent waiver in this case. In *United States v. Smith*, 523 F.2d 788 (5th Cir. 1975), *cert. denied*, 424 U.S. 973, 96 S.Ct. 1475, 47 L.Ed.2d 742 (1976), this Court found an adequate waiver by defendant under Rule 23(b) even though a written waiver which it had been assumed the defendant had signed was lost, and the defendant could not recall whether he had signed any written waiver and denied in open court that he had orally specifically agreed to the waiver. But on the trial judge's conclusion that he had orally agreed to the waiver at an earlier time, supported by the record, the Court upheld the waiver. Further, in *United States v. Spiegel*, 604 F.2d 961 (5th Cir. 1979), this Court upheld a waiver accomplished wholly by counsel speaking on behalf of the defendant.

In this case we have a waiver by counsel speaking on behalf of a defendant which was confirmed in writing and signed by the defendant specifically and introduced in evidence before the verdict. The signed, written waiver after the questioning of defendant by the judge cured any possible weakness in the earlier agreement to the waiver expressed on behalf of defendant by his counsel. Since the written waiver was, in the precise terms of the rule, "before verdict", and since the defendant was specifically questioned by the judge to remove any possible taint of coercion, an express, knowing and intelligent waiver by defendant Huff clearly is shown. We also reject Huff's contention that the court's questioning of defendant was itself coercive.

The decision of the district court that defendant had expressly, knowingly and intelligently waived the right to

trial by jury of twelve and agreed to submit his case to a jury of eleven is

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1199
Summary Calendar

D. C. Docket No. CR 3 79 181

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES LOMAN HUFF,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 17, 1981

ISSUED AS MANDATE: MAR 11 1981
REISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

U.S. COURT OF APPEALS
FILED
MAY 8 1981
GILBERT F. GANUCHEAU
CLERK

NO. 80-1199

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES LOMAN HUFF,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(May 8, 1981)

Before CHARLES CLERK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

ENTERED FOR THE COURT:

/s/ J[illegible] E. Williams
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE